for real property transactions had improved considerably so as to obviate any call for further reduction of the reserve price and in any event no evidence had been furnished to indicate that the said land was worth less than the reserve price; and (5) that more than enough time had been granted to the guarantor to settle the debt since the act of bankruptcy. As I had rejected all the grounds put forward by Mr Sagadeva and Mrs Ong Peck Ha in their contentions that the creditor's petitions ought to be set aside, I was of the view that Mr Parthiban had established good grounds for the court to disallow any further postponement of the making of the receiving order as more than sufficient opportunity had been given to the parties affected to settle the debt. I accordingly made a receiving and adjudication order against the guarantor as prayed in the petition with costs of the notice of the motion to be taxed. I had accordingly to make similar orders against each of the judgment debtors in respect of the other three petitions in Bankruptcy Nos 43-639 of 1987, 43-652 of 1987 and 43-653 of 1987.

Order accordingly.

Solicitors: *Yee & Saga; L Parthiban & Associates.*

Reported by *Wong Kim Fatt*

Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor

Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor

HIGH COURT (JOHORE BAHRU) - CIVIL SUIT NOS 23-598-1985 AND 22-1020-1985
MOHAMED YUSOFF J
5 AUGUST 1989

Legal Profession - Solicitors - Retainer of solicitor - Proof of retainer - Duty of care and skill of solicitors - Solicitors acting for more than one party in transaction - Conflict of interests of parties and solicitors' obligations to them - Solicitor as stakeholder - Duty of solicitor

Tort - Fraud - Negligence - Professional negligence - Loan transaction - Charge over land as security - Solicitors acting for lender, borrower and chargor - Lender a victim of solicitors' previous misdeed - Solicitor in breach of undertaking to repay money to lender - Loan moneys released to solicitors - Solicitors using part of loan to rectify breach of undertaking to lender - Borrower suffering loss - Whether lender and solicitors guilty of fraud and collusion

The above two actions were consolidated and tried together. The plaintiff in the first action, Dato' Seri Au Ba Chi, sought various remedies against the defendants in regard to a transaction in which a loan of $3,000,000 was granted by the first defendants to the plaintiff in the second action, Dato' Au Development Sdn Bhd. In the second action, Dato' Au Development Sdn Bhd sought remedies against the same defendants as in the first action in regard to the same transaction.

Dato' Au was the owner of 51 pieces of land which he had charged to the first defendant as security for the loan. The loan was disbursed through the second defendant which was a firm of solicitors acting for the first defendants. It was alleged that the second defendant, without the knowledge of the plaintiffs, had released to a company, Kim Hiong Realty Sdn Bhd, the sum of $500,000 being part of the money lent and converted the same to the use of the first and/or the second defendants.

Upon approval of the loan by the first defendant, the second defendant had requested the release of the sum of $3,000,000 to itself as stakeholder and gave an undertaking to refund the whole sum in the event that legal charges over the lands were not registered. The money was released by the first defendant to the second defendant on 25 June 1983. The charge documents, although executed by the parties concerned, were not presented for registration until 20 August 1983. By that time, the second defendant had released the sum of $2,167,088.78 to Dato' Au Development Sdn Bhd and the sum of $500,000 to Kim Hiong Realty Sdn Bhd. The second defendant alleged that the sum of $500,000 was released on the instructions of Dato' Au, an allegation which was denied by the plaintiffs.

The second defendant alleged that, on the instructions of Kim Hiong Realty Sdn Bhd, out of this sum, it paid the sum of $300,000 to the first defendant so as to settle a debt in the sum of $300,000 owing by a company, Chuan Hin Trading Sdn Bhd, to the first defendant. There was evidence that in regard to this sum, the second defendant had been in breach of an undertaking to pay the sum to the first defendant since 1982.

Held, allowing the plaintiffs' claim:

(1) Generally the duty of a stakeholder is to hold the stake in medio pending the outcome of a future event; he holds it as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands. This was the position the second defendant held itself out to be in when the money was released to it.

(2) There is no legal requirement for a retainer of solicitors to be in writing. There was sufficient evidence to show that the conduct of the parties intended that the relationship of solicitor and client was to continue to exist between the second defendant and the plaintiffs from their earlier dealings. In the circumstances, a retainer was established between the second defendant and the plaintiffs.

(3) The duty derived from this retainer and imposed on the second defendant was to disburse the loan of $3,000,000 in full to Dato' Au Development Sdn Bhd and this was to be done upon completion of the security documents.

(4) The second defendant had breached its undertaking to the first defendant and its obligations to the plaintiffs. It had acted for more than one client whose interests directly conflicted with its obligations to the plaintiffs. It had the onus of proving that the conflicting interests did not prevent it from doing its duty to both clients.

(5) Under the general law, the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do.

(6) The second defendant was given the knowledge that the loan was to be utilized for the plaintiffs' housing project and that full release of the loan was important to the plaintiffs. The period of the loan was also specified to be 24 months during which time the housing project was expected to be completed. It could be

concluded therefore that the plaintiffs relied on the second defendant to achieve that purpose and the second defendant were fully cognizant of their obligations.

(7) The second defendant failed to obtain full release of the loan and was for this reason in breach of the duty of care and skill which was required of them and a claim in tort can lie against them for breach of such duty.

(8) The first defendant, not heeding their past experience, namely, the second defendant's failure to honour its undertaking to pay the sum of $300,000, had released the loan of $3,000,000 to the second defendant and retained them as their solicitors, ignoring Dato' Au's protest. On the basis of the foregoing, the first defendant was not blameless for the plaintiffs' loss. The whole evidence had given rise to the irresistible conclusion that there had been collusion between the first and second defendants to defraud the plaintiffs. The first defendant was therefore equally liable in tort.

[*Editorial Note*: The first defendant in both suits has appealed to the Supreme Court vide Civil Appeal No 02-369 of 1989.]

Cases referred to

1 *Sorrell* v *Finch* [1976] 2 All ER 371 (refd)
2 *Kuldip Singh & Anor* v *Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256 (folld)
3 *Midland Bank Trust Co Ltd* v *Hett, Stubbs & Kemp* [1978] 3 All ER 571 (folld)
4 *Yong & Co* v *Wee Hood Teck Development Corp Bhd* [1984] 2 MLJ 39 (refd)
5 *Groom* v *Crocker* [1938] 2 All ER 394 (folld)
6 *Smith* v *Mansi* [1962] 3 All ER 857 (folld)
7 *Ross* v *Caunters* [1979] 3 All ER 580 (folld)

Humfrey B Ball for the plaintiff in Civil Suit No 22-1020-1985.
Hussein Haji Noor for the plaintiff in Civil Suit No 23-598-1985.
Subra Naicker for the first defendant in both suits.
E Ramasamy for the second defendant in both suits.

Cur Adv Vult

Mohamed Yusoff J: This judgment is delayed because of my transfer to Kuala Lumpur and the dislocation of work there. I apologize for these.

The remedies sought by both plaintiffs in this consolidated action are for accounts arising from a loan granted and disbursed by the defendants. Dato' Au Ba Chi (now referred to as the first plaintiff), owned 51 pieces of land at Bandar Penggaram, Batu Pahat, Johore. Descriptions of these lands are annexed to this judgment [but are not included in this report]. He charged all these properties to the Malayan United Finance Bhd (the first defendant), for a loan of $3m to his company, known as Dato' Au Development Sdn Bhd (the second plaintiff). The loan was disbursed through LS Chua & Co (the second defendant), a firm of solicitors from the first defendant's panel of lawyers. It is alleged that the second defendant, without the plaintiffs' knowledge, released $500,000 from the loan sum of $3m, to Kim Hiong Realty Sdn Bhd ('Kim Hiong') and converted the same to the use of the first and/or second defendants. In this respect a declaration is sought that the first defendant had wrongfully debited the plaintiffs' account with the said sum and interest as due to them from 25 June 1983. In addition to these, the first plaintiff also claims for loss and damage due to the sale of his charged lands, as ordered by the court, upon sale by public auction; and the second plaintiff for the return of the $500,000 aforesaid and interest.

Stakeholder

The second defendant was represented by Chua Lai Seng (DW4), the dominant partner of the firm, in its dealing with this loan. Upon approval of the loan by the first defendant on 2 March 1983 (exh DBD4-18), the second defendant requested the release of the full sum of $3m to the firm as stakeholder. The firm's letter, addressed to the first defendant, at exh DBD4-44 dated 21 June 1983, gave an undertaking to refund the whole sum in the event that legal charges of the first plaintiff's lands were not registered. On 25 June 1983, the first defendant released the money to the second defendant (exh DBD4-48) as requested.

In *Sorrell* v *Finch*[1] at p 376, Lord Denning MR is quoted to have defined the duties of an estate agent stakeholder as follows:

> ... 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner* v *Trustee of the Property of Reed* [1967] 2 All ER 1286 at p 1287, per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank ... see *Eltham* v *Kingsman* (1818) 1 B & Ad 683 and *Hampden* v *Walsh* (1876) 1 QBD 189.

Lord Denning's view was a dissenting Court of Appeal decision but was later upheld by the House of Lords on further appeal. Wan Hamzah J (as he then was) accepted and applied this view in *Kuldip Singh & Anor* v *Lembage Letrik Negara & Anor*,[2] a case of almost similar nature.

Bearing these cases in mind it seems proper to accept the view that generally the duty of a stakeholder is to hold the stake in medio pending the future outcome of a future event; that he holds it as trustee for both parties to await that event, and that until that event is known it is his duty to keep it in his own hands. This was the position the second defendant held himself out to be itself when the money was released to the firm.

By instructions of the first defendant to the second defendant (exh DBD4-24), the event to occur for the disbursement of the loan was the completion of the security documentation. This was in respect of legal charges on the first plaintiff's land enumerated in the letter and as per the annexed list; upon occurrence of that event the loan was to be released in full to the second plaintiffs. The second defendant did not do this.

Mr Subra Naicker, on behalf of the first defendant, said that the first defendant had kept to its terms and released the loan to the second defendant, as common solicitor, for the benefit of the plaintiffs upon execution of the charged document in respect of the first plaintiff's lands and after obtaining a guarantee from the first plaintiff's wife. It is noted, however, that the charge document, though executed by the parties concerned, was not presented for registration until 20 August 1983 (exh DBD3-16), almost three months after the loan was released. It is clear that the second defendant had not kept to its instruction. This also shows a flagrant disregard of s 20 of the Finance Companies Act 1969 by the first defendant for providing a loan in excess of $5,000 without security. This in itself is an offence under the Act.

Common solicitor

The question that arose was whether the second defendant was also acting for the first and second plaintiffs as common solicitor when disbursement of the loan was made on their behalf. There was no written retainer of the second defendant by the plaintiffs. But there is no legal requirement for retainers to be in writing - *Corderey on Solicitors* (7th Ed) at p 50.

In *Midland Bank Trust Co Ltd* v *Hett, Stubbs & Kemp*[3] at p 578:

> ... a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them.

There is sufficient evidence to show that the conduct of the parties intended that the relationship of solicitor and client was to continue to exist between the second defendant and the plaintiffs from their earlier dealings. These were: In November 1980, the second defendant charged the same properties belonging to the first plaintiff to Malayan Banking Bhd (exh DBD4-142). In September 1981, the second defendant prepared agreements for the second plaintiff (exh DBD4-6). Between 1980 to 1983, the relationship between the first plaintiff and the second defendant was good and they were friends and they had other dealings together. The second defendant said the first plaintiff had always paid his fees promptly.

For further discussion on the subject of retainer by conduct, I would refer to *Yong & Co* v *Wee Hood Teck Development Corp Bhd*.[4] In these circumstances, I hold that a retainer was established between the second defendant and the plaintiffs.

The contractual duty between solicitor and client is as set out by Scott LJ in *Groom* v *Crocker*[5] at p 413:

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two is contractual.

The duty derived from his retainer and imposed on the second defendant, as required at exh DBD4-24, was to disburse and release the loan of $3m in full to the second plaintiff. This was to be done upon completion of security documents. In the event of doubt the second defendant was obliged to consult the plaintiffs and to keep the plaintiffs informed of matters affecting that disbursement.

The second defendant's clients' account in respect of the second plaintiff's transactions relating to this loan (exh DBD4-13) shows a credit sum of $3m as at 25 June 1983. On 27 June 1983 the account was debited with $2,167,088.78, as payment to the second plaintiff and on 30 June 1983, a further sum of $500,000 was debited as loan to Kim Hiong. The second defendant's explanation in his evidence relating to this $500,000 is that he was instructed verbally by the first plaintiff to extend the loan to Kim Hiong and that, as a result of this, he wrote to the second plaintiff on 15 July 1983 (exh DBD4-57) confirming the loan. In support of that contention, he said that he accounted for this loan by repayment vouchers at exhs DBD4 at pp 59, 75, 77, 78 and 88 for various sums paid to the second plaintiffs.

What is worthy to note is that no one from Kim Hiong Realty Sdn Bhd gave evidence confirming this loan to the company. The evidence of DW1, an executive officer of the first defendant, who had frequent dealings with Kim Hiong, states that she spoke to Tan Kay Kheng, the principal director of Kim Hiong, who denied having taken the said loan from the second plaintiff (p 121 N/E). She is a disinterested witness and, in my view, is credible.

The first plaintiff, on the other hand, denied receiving these various sums stated in the second defendant's vouchers except for the sums of $31,000 and $150,000 in exh DBD4-76 and 59, and some other payments which, he said, were payments for different purposes. However, he alleged that the vouchers at exh DBD4 at pp 75, 77, 78 and 88 were forged. He pointed to another set of vouchers at exh DBD5 at pp 48, 49, 50 and 51, also prepared by the second defendant, showing payments for similar sums to him, but not stated there for what purpose the payments were made. He denied that the signatures appearing on these two sets of vouchers were his.

No expert evidence was adduced on this allegation and it was therefore incumbent on the court to compare these signatures. On comparison of the first plaintiff's signature on those exhibits with his usual signature at

exh DBD4 at pp 59 and 76, and on other documents in the bundle of exhibits, it is apparent that these signatures do not appear to be similar. In my view and in all probability, the first plaintiff's denial that they were not his is true.

Whether the second defendant's obligation was discharged:

As solicitor, the second defendant's obligation to:

(a) the first defendant, as expressed in the instruction at DBD4-24, was to prepare documentation including legal charges on the first plaintiff's properties. He was to have them executed, presented and registered in order to secure the second plaintiff's loan; and

(b) both the plaintiffs he contracted, upon completion of these security documentation, was to release the $3m in full to the second plaintiffs.

As shown in exh DBD3-16, those documentations were completed on 20 August 1983. As of that date the second defendant's obligation to the first defendant was discharged but not his obligation to the plaintiffs. By that date only a sum of $2,167,088.78, as shown in his account at exh DBD4-13, was paid to the second plaintiffs. The second defendant's explanation on the remaining sum was his disbursements for the following purposes: (i) loan to Kim Hiong for $500,000; (ii) release of the charge on the first plaintiff's lands from MBB Bhd of $289,011.22; and (iii) $43,900 stamp duties and his own fees. The plaintiffs do not dispute disbursements for items (ii) and (iii), as these were within their instructions to redeem and again charge the properties to the first defendant, but denied that instruction was given for the loan to Kim Hiong at item (i).

The second defendant's contention that the loan of $500,000 was made on the instruction of the first plaintiff is difficult to believe, in view of his admission and contradiction in his cross-examination. In the first instance the second defendant admitted that his firm's account in respect of this loan was only notional. Next, he said that the money lent was not actually paid to Kim Hiong but to its creditors. And further, he said that the $500,000 was transferred from the second plaintiff's account without the plaintiffs' authority. Over and above these contradictions, there is the evidence that the payment vouchers prepared by his firm respecting this loan were forged. It would appear that the explanation is frivolous but in actual fact the money was misappropriated.

Clearly, the second defendant has breached his undertaking and his obligations to the plaintiffs also. He had acted for more than one client, whose interests directly conflicted with his obligations to the plaintiffs. The onus of showing that the conflicting interests did not prevent him from doing his duty to both clients rested firmly on him - see *Smith* v *Mansi*[6] at p 859 and *Yong & Co* v *Wee Hood Teck Development Corp*[4] at p 45 - and he failed to discharge this onus.

Liability in tort

Under the general law the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do - see *Midland Bank Trust Co Ltd* v *Hett, Stubbs & Kemp*.[3]

One of the conditions attached to the loan approval to the plaintiffs was that the first option for end-financing to house purchasers should be given to the first defendant. This was referred to in the instruction to the second defendant (exh DBD4-24). In that event the second defendant was given the knowledge that the loan was to be utilized for the plaintiffs' housing project and that full release of the $3m loan was important to the plaintiffs. The period of the loan was also there specified for 24 months during which time the housing project was expected to be completed. It can be concluded therefore that the plaintiffs relied on the second defendant to achieve that purpose and the second defendant was fully cognizant of his obligations.

The second defendant failed to obtain full release of the $3m and was for this reason in breach of his duty of care and skill which was required of him and a claim in tort can lie on him for breach of such duty. The injury caused to the plaintiffs by the failure of the second defendant in the exercise of his duty not only caused the housing project envisaged by the second plaintiff to be abandoned but it also resulted in the security in the 51 pieces of land provided by the first plaintiff being foreclosed by the first defendant and placed for auction. In any event, in an action on tort, if a duty of care is owed and the loss is directly caused by breach of that duty, reliance by the plaintiffs is irrelevant: see *Ross* v *Caunters*[7] at p 591.

Was the first defendant liable?

The claim against the first defendant is that the first defendant had unlawfully and without consent of the plaintiffs released $500,000 to Kim Hiong and converted the same for the use of the first defendant. The evidence on this is that a sum of $300,000 from the $3m stake money was paid to the first defendant. This is shown in the second defendant's account (exh DBD5-37) and his evidence (see N/E at p 232). The second defendant explained that this was done on the instruction of Kim Hiong to settle Chuan Hin Trading Sdn Bhd's ('Chuan Hin') debt to the first defendant. The debt had arisen since 1982 in this way.

On 29 September 1988, the second defendant had similarly held himself as stakeholder for the $300,000 loan granted by the first defendant to Chuan Hin. The loan was to be used to redeem Chuan Hin's property from Public Bank. The second defendant had given his firm's undertaking to refund the money to the first defendant in the

event that Chuan Hin could not discharge the pro-perty. The property was not discharged. However, the sum of $300,000 was not refunded to the first defendant. The second defendant explained that he had placed the money in a fixed deposit and on 25 June 1983, he withdrew the money and gave it to Kim Hiong, as payment for the purchase of lands by Chuan Hin from Kim Hiong. (Again there is no evidence from Kim Hiong to confirm this explanation as true.)

Rather than supporting his contention of honest dealing with his client's money this evidence, in my view, clearly shows that the second defendant had flouted his undertaking to the first defendant without any compunction on his part as early as 1982. The conclusion which can be drawn from this is that the second defendant had misappropriated the loan granted to Chuan Hin contrary to his duty as a stakeholder to the first defendant. In those circumstances, it is reasonable to infer that the first defendant had looked to the second defendant to make good the loss suffered by the first defendant.

Following that unpleasant event, the first defendant, not heeding his past experience, released the plaintiffs' present loan to the second defendant and retained him as its solicitor, ignoring the first plaintiff's protest. On the basis of the foregoing, the first defendant is not blameless for the plaintiffs' loss.

The whole evidence has given rise to the irresistible conclusion that there had been collusion between the first and second defendants to defraud the plaintiffs. For these reasons I find that the first defendant is equally liable in tort and would give judgment to both the plaintiffs as prayed. In respect of the first plaintiff's claim for loss and damages, no argument has been advanced during trial. I would reschedule arguments for these after the period of appeal.

Order accordingly.

Solicitors: *Wong & Paramjothy; Mah Weng Kwai & Associates; Subra Naicker & Co; E Ramasamy & Co.*

Reported by *PS Ranjan*

Petaling Rubber Estates Ltd v Collector of Land Revenue, Kedah

HIGH COURT (ALOR SETAR) - LAND REFERENCE NO 27 OF 1985
LIM BENG CHOON J
12 JUNE 1989

Land Law - Compensation - Fair market value of land - Principles of assessment - Consequential loss - Surveyors' fees - Land Acquisition Act 1960, First Schedule s 3(e)

The applicants ('objectors') were the owners of a rubber holding measuring 2,890.37 acres in size. A part of the holding measuring 20 acres in size was acquired compulsorily under the Land Acquisition Act 1960 following which a land reference was made to the court under s 38 of the Act. About one-half of the land came within an area zoned for residential purposes and the remainder within a 'green belt area'. The principal issue in the reference was as regards the amount of compensation rightly payable to the applicants for the land. Expert evidence regarding the fair market value of the land was tendered by the applicants and by the respondent. The private surveyor who gave evidence for the applicants also stated that in his opinion, as the applicants had also incurred consequential loss in the employment of a firm of chartered surveyors for the purpose of the acquisition proceedings, a sum of $10,600 should be awarded as incidental costs.

Held, increasing the award for the fair market value of the land:

(1) Had the private surveyor adhered strictly or even substantially to the judicially acknowledged rule of using the comparable sales of the same land or similar lands of similar quality situated in the locality at or prior to the time of acquisition as the basis of his assessment, after making allowances for the differences in the various features, to arrive at his conclusion, the court could hardly dispute the correctness of his assessment.

(2) The underlying principle in the awarding of compensation for the compulsory acquisition of land is that an enhanced value of the land acquired which is derived from unrealized possibilities or potentialities must be determined only from the profitable use or future use of the said land to which it has been put at the time of the acquisition and not from any advantage derived from the purpose for which the land was acquired.

(3) The quality and quantity of rubber which a particular estate could produce must still be a significant factor in determining the sale price of a rubber holding, and in determining the extent of any increase in the prices of rubber lands to a particular holding the court cannot ignore the fact that the extent of the increase must inevitably be dictated by the yield of rubber from that particular holding.

(4) It had been said that common experience had shown that in areas where there is a small population the price per unit of area for a large parcel is less than the price per unit of a small parcel.

(5) It would no doubt be wrong in principle to give an award on the higher side for that part of the land which fell within the residential zoning area and another separate and lesser award for the remaining part. The correct method was to take this special feature of the land in assessing the fair market value of the land as a whole.